(2022) 04 NCLT CK 0003

In the National Company Law Tribunal

Case No : C P(CAA) No. 149/KB/2021ConnectedwithCA (CAA) No. 120/KB/2021

Goodview Vanijya Private Limited Vs

Date of Decision : 01-04-2022

Acts Referred:
Companies Act, 2013 — Section 230, 230(1) 232, 232(1)

Citation : (2022) 04 NCLT CK 0003

Hon'ble Judges : Rohit Kapoor, Member (J);Harish Chander Suri, Member (T)

Bench : Division Bench

Advocate : Arani Guha, Madhuri Pandey, Sanjay Sardar

Final Decision : Dismissed

Judgement

Harish Chander Suri, Member (Technical)

1. The instant petition has been filed under Section 230 read with Section 232 of the Companies Act, 2013 (“Act”) for sanction of the Scheme of Amalgamation of Sri Bhootnath Jewellers Private Limited, being the petitioner No. 2 above named ("Transferor Company No 1" or “petitioner No. 2”) and Goodview Reality Private Limited, being the petitioner No. 3 above named ("Transferor Company No. 2" or “petitioner No. 3”), with Goodview Vanijya Private Limited, being the petitioner No. 1 abovenamed ("Transferee Company" or “petitioner No. 1”) whereby and whereunder the Transferor Company is proposed to be amalgamated with the Transferee Company from the Appointed Date, viz 01.04.2020 in the manner and on the terms and conditions stated in the said Scheme of Amalgamation (“Scheme”).

2. The Petition has now come up for final hearing. Counsel for the Petitioners submits as follows:-

a) The Scheme was approved unanimously by the respective Board of Directors

of the Petitioner Nos. 1 to 3 at their meetings held on 6th November, 2020 and 6th March, 2021.

b) The circumstances which justify and/or have necessitated the Scheme and the benefits of the same are, inter alia, as follows:-

i. Pooling of resources, creation of a strong capital base, consolidation of operations and business relevant for growth of the Transferee Company which is beneficial for all its' stakeholders;

ii. Reduction of administrative costs, operative and overhead expenses which would further lead to cost efficiency and optimum utilization of the available resources; and

iii. Effective Management Control and improved organizational capability arising from pooling of financial, technical and managerial resources.

c) The Statutory Auditors of the Petitioner Nos. 1 to 3 have by their certificates dated 31st March, 2021 confirmed that the accounting treatment in the Scheme is in conformity with the accounting standards prescribed under Section 133 of the Companies Act, 2013.

d) The exchange ratio of shares in consideration of the Amalgamation has been fixed on a fair and reasonable basis and on the basis of the Report thereon of CA, Pijush Karmakar, bearing IBBI Registration No. IBBI/RV/06/2019/11909, Registered Valuer.

e) The shares of the Petitioner Nos. 1 to 3 are not listed on the any stock exchanges.

f) By an order dated 2nd July, 2021, in Company Application (CAA) No. 120/KB/2021, this Tribunal made the following directions with regard to meeting(s) of creditors under Section 230(1) [read with Section 232(1) of the Act:-

Meetings dispensed: Meetings of the Equity Shareholders of the Applicant No. 1, Meetings of the Equity Shareholders and Unsecured Creditors of the Applicant No. 2, Meetings of the Equity Shareholders and Unsecured Creditors of the Applicant No. 3, are dispensed with under Section 230(1) read with Section 232(1) of the Act.

g) Consequently, the Petitioner(s) presented the instant petition for sanction of the Scheme. By an order dated 29th November, 2021, the instant petition was admitted by this Tribunal and fixed for hearing on 24th January, 2022 upon issuance of notices to the Statutory / Sectoral Authorities and advertisement of date of hearing. In compliance with the said order dated 29th November, 2021, the Petitioner(s) have duly served such notices on the Official Liquidator, Ministry of Corporate Affairs, on 29th December, 2021, The Registrar of Companies (West Bengal) on 29th December, 2021, The Regional Director (Eastern Region) on 29th December, 2021 and Income-Tax Officer of the Transferor Company and the Transferee Company on 31st December, 2021. The Petitioner(s) have also published such advertisements once each in the Bengali Newspaper i.e., "Aajkaal" and in English Newspaper i.e., "The Financial Express" on 27th December, 2021. An affidavit of compliance in this regard has also been filed by them on 4th January, 2022.

h) All statutory formalities requisite for obtaining sanction of the Scheme have been duly complied with by the Petitioners. The Scheme has been made bona fide and is in the interest of all concerned.

3. Pursuant to the said advertisements and notices the Regional Director, Ministry of Corporate Affairs, Kolkata ("RD") and the Official Liquidator, Kolkata ("OL") have filed their representations before this Tribunal.

4. The Official Liquidator has filed his report dated 14th February, 2022 and concluded as under:-

"Paragraph 10: That the Official Liquidator on the basis of information submitted by the Petitioner Companies is of the view that the affairs of the aforesaid Transferor Companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest as per the provisions of the Companies Act, 1956/the Companies Act, 2013 whichever is applicable".

5. The RD has filed his reply affidavit dated 1st March, 2022 ("RD affidavit") which has been dealt with by the Petitioner(s) by their Rejoinder affidavit dated 2nd March, 2022 ("Rejoinder"). The observations of the RD and responses of the Petitioner(s) are summarized as under:-

a) Paragraph No. 2 (a)of RD Affidavit: That it is submitted that on examination of the report of the Registrar of Companies, West Bengal, it appears that no complaint and /or representation regarding the proposed Scheme of Amalgamation. The petitioner companies are updated in filing their Statutory Returns.

Paragraph No. 2 of Rejoinder: With regard to point 2(a) of the Affidavit of the Regional Director (Eastern Region), MCA, the said is self-explanatory.

b) Paragraph No.2(b)of RD Affidavit: Petitioner company should undertake to comply with the provisions of section 232(3)(i) of the Companies Act, 2013 through appropriate affirmation.

Paragraph No. 3 of Rejoinder: With regard to point 2(b) of the said affidavit, I affirm that the Petitioners will comply with the provisions of section 232(3)(i) of the Companies Act, 2013.

c) Paragraph No. 2(c) of RD Affidavit: That the Transferee Company should be directed to pay applicable stamp duty on the transfer of the immovable properties from the Transferor Companies to it.

Paragraph No. 4 of Rejoinder: With regard to point 2(c) of the said affidavit, I affirm that the Transferee Company will pay applicable stamp duty on the transfer of the immovable properties from the Transferor Company to it as applicable pursuant to approval of scheme of amalgamation.

d) Paragraph No. 2(d) of RD Affidavit: The Hon'ble Tribunal may kindly direct the Petitioners to file an affidavit to the extent that the Scheme enclosed to the Company Application and Company Petition are one and same and there is no discrepancy or no change is made.

Paragraph No. 5 of Rejoinder: With regard to point 2(d) of the said affidavit, I affirm that there is no discrepancy or change in the scheme as filed before the Hon’ble Tribunal in the Company Application and Company Petition.

e) Paragraph No. 2(e) of RD Affidavit: The Petitioners under provisions of section 230(5) of the Companies Act 2013 have to serve notices to concerned authorities which are likely to be affected by the Amalgamation or arrangement. Further, the approval of the scheme by the Hon'ble Tribunal may not deter such authorities to deal with any of the issues arising after giving effect to the scheme. The decision of such authorities shall be binding on the Petitioner Company (s) concerned.

Paragraph No. 6 of Rejoinder: With regard to point 2(e) of the said affidavit, we affirm that the notices had already been served upon the concerned authorities as per the directions given by the Tribunal.

f) Paragraph No.2 (f) of RD Affidavit: The Transferor Company, Sri Bhootnath Jewellers Private Limited held more than 20% shares of Transferee Company, Goodview Vanijya Private Limited as on 31.3.2021. But no consolidated financial statement has been filed for 2021-21 by the company contrary to the provisions of section 137(1) read with section 129(3) of the Companies Act 2013, rendering the financial statement filed as incomplete. Similar Violation was made for the financial years 2019-20, 2018-19, 2017-18 and 2016-17. The company should first file the consolidated financial statements for the said years. Once merged the company shall become non-active on MCA portal and would have the plea that it is no more in a position to file the pending complete financial statements. Filing of such complete financial statements is statutorily mandated in terms of the provisions of section 137 of the Companies Act 2013. It would entail not only avoidance of statutory obligation of filing the Returns but also loss of fee revenue to Government.

g) Paragraph No. 7 of Rejoinder: With regard to point 2(f) of the Affidavit I would like to state as follows:

For the FY 2015-16 to 2017-18, the provisions of section 129 (3) read as follows:

“Where a company has one or more subsidiaries, it shall, in addition to financial statements provided under sub section (2), prepare a consolidated financial statement of the company and all of the subsidiaries in the same form and manner as that of its own which shall also be laid before the annual general meeting of the company along with the laying of financial statement under sub section (2).

Provided that the company shall also attach along with its financial statements, a separate statement containing the salient features of the financial statements of its subsidiary or subsidiaries in such form as may be prescribed.

Provided further that the central government may provide for the consolidation of accounts of companies in such manner as may be prescribed.”

With effect from (07.05.2018) the section read as follows:

“Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (2), prepare a consolidated financial statement of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (2):

Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries and associate company or companies in such form as may be prescribed:

Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed.”

This shows that the intent of legislature was limited to filing of consolidated Financial Statements for subsidiaries only and not for associates.

I further undertake to approach the office of Registrar of Companies, West Bengal, to have the forms cancelled and rectified forms uploaded for the Transferee Company, as consolidation of either entity which have the same impact and figures and will reflect the right document on the government portal.

I further undertake to have the matter compounded under section 441 of the Companies Act, 2013 by the transferee company.

h) Paragraph No. 2 (g) of RD Affidavit: The Transferor company, Sri Bhootnath Jewellers Private Limited, reported in its balance sheet as at 31.3.2021 under head "Other Current Assets" Goodview Vanijya Private Limited Rs. 1,20,659/- But no disclosure of the nature of such assets and others was made contrary to the provisions of schedule 111 to the Companies Act 2013. Consequently, not only provision of the Companies Act was violated, disclosure of crucial feature of the state of affairs of the company was concealed. As a result, this deponent is not in a position to have comprehensive observation regarding the state of affairs of the company for drawing up the representation under section 230(5) of the Companies Act 2013. Once the company discloses the particulars of the said items this deponent can prepare the representation.

Paragraph No. 8 of Rejoinder: With regard to point 2(g) of the said affidavit, I affirm that the same will be disclosed by the Transferee Company in its current financial year balance sheet and without prejudice to the same, the Transferee Company undertakes to give all relevant disclosures for all the assets and investment. However, if the Hon'ble Tribunal so feels and directs the same can be compounded from the end of the transferee company upon the approval of the scheme.

6. The violation pointed out by the Regional Director (ER) in his Report are all technical in nature and are compoundable. The regulatory authorities have not found the Scheme itself to be violative of any statute. Technical violations such as the ones pointed out by the Regional Director (ER) would not be enough to withhold sanction of Scheme itself. Therefore, while we are inclined to accord sanction to the Scheme, such sanction shall not stand in the way of any action to which the Petitioner Companies may be liable in accordance with law. We leave it to the authorities concerned to see if there has been any violation of provisions of law by the Petitioner Companies and to take action as may be deemed appropriate under the law against the Transferee Company.

7. Heard the submissions made by the Ld. Counsel appearing for the Petitioners, it is ordered that in case of any default in this respect of the Transferor Companies, the ROC, West Bengal shall be at liberty to initiate appropriate proceedings against the Transferee Company, which after the sanction of the scheme by this Tribunal is in any case responsible for the liabilities/non-compliance of the Transferor Companies also.

8. Further, heard submissions made by the Ld. Counsel appearing for the Petitioner, the Joint Director for and on behalf of RD, who appeared and were heard. Upon perusing the records and documents in the instant proceedings and considering the undertaking given by the Petitioner Companies vide Affidavit in Rejoinder affirmed on 02.03.2022, we allow the petition and make the following orders:

a) The Scheme of Amalgamation mentioned in paragraph 1 of the petition, being Annexure "A" is hereby sanctioned by this Tribunal to be binding with effect from 1st April, 2020 ("Appointed Date") on Sri Bhootnath Jewellers Private Limited, being the Petitioner No. 2 above named ("Transferor Company No 1" or "Petitioner No. 2") and Goodview Reality Private Limited, being the Petitioner No. 3 above named ("Transferor Company No. 2" or "Petitioner No. 3"), with Goodview Vanijya Private Limited, being the Petitioner No. 1 abovenamed ("Transferee Company" or "Petitioner No. 1") their respective shareholders and creditors and all concerned;

b) All the property, rights, subsidy schemes and powers of the Transferor Companies, including those described in the Schedule of Assets herein, be transferred from the said Appointed Date, without further act or deed, to the Transferee Company and, accordingly, the same shall pursuant to Section 232(4) of the Companies Act, 2013, be transferred to and vest in the Transferee Company for all the estate and interest of the Transferor Companies therein but subject nevertheless to all charges now affecting the same, as provided in the Scheme;

c) All the debts, liabilities, duties and obligations of the Transferor Companies be transferred from the said Appointed Date, without further act or deed to the Transferee Company and, accordingly, the same shall pursuant to Section 232(4) of the Companies Act, 2013, be transferred to and become the debts, liabilities, duties and obligations of the Transferee Company;

d) The employees of the Transferor Companies shall be engaged by the Transferee Company, as provided in the Scheme;

e) All proceedings and/or suits and/or appeals now pending by or against the Transferor Companies be continued by or against the Transferee Company, as provided in the Scheme;

f) The Transferee Company do without further application issue and allot to the shareholders of the Transferor Companies, the shares in the Transferee Company to which they are entitled in terms of the Scheme;

g) Leave is granted to the Petitioner(s) to file the Schedule of Assets of the Transferor Company in the form as prescribed in the Schedule to Form No. CAA7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 within three weeks from the date of receiving a copy of this order;

h) The Transferor Companies and the Transferee Company shall each within thirty days of the date of the receipt of this order, cause a certified copy thereof to be delivered to the Registrar of Companies for registration and on such certified copies being so delivered, the Transferor Companies shall be dissolved with effect from the date or last of the dates of filing of the certified copies of the order, as aforesaid (Effective Date) and the Registrar of Companies shall place all documents relating to the Transferor Companies and registered with him on the file kept by him in relation to the Transferee Company and the files relating to the said companies shall be consolidated accordingly.

9. The Petitioner(s) shall supply legible print out of the scheme and schedule of assets in acceptable form to the registry and the registry will append such printout, upon verification to the certified copy of the order.

10. Company Petition being C.P. (CAA) No. 149/KB/2021 is disposed of accordingly.

11. Urgent certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.